IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM AND MOTION FOR DESIGNATION OF VICTIM STATUS UNDER THE CRIME VICTIMS' RIGHTS ACT

THE UNITED STATES OF AMERICA, by and through its attorney, William J. Hochul, Jr., United States Attorney for the Western District of New York, and Robert G. Dreher, Acting Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division, and the undersigned Assistant United States Attorney and Senior Trial Attorney, respectfully files this supplemental sentencing memorandum in response to two issues discussed during the status conference before the Court on October 22, 2013.

BACKGROUND

On March 28, 2013, the jury found Defendant Tonawanda Coke Corporation ("Tonawanda Coke") guilty of 14 felony counts and Defendant Mark L. Kamholz ("Defendant Kamholz") guilty of 15 felony counts. Specifically, both defendants were found guilty of Counts 1 through 5 (violations of the Clean Air Act ("CAA") by emitting

coke oven gas from an unpermitted emission source), Count 9 (violation of the CAA by operating the western quench tower without baffles), Counts 11 through 15 (violations of the CAA by operating the eastern quench tower without baffles), and Counts 17 through 19 (violations of the Resource Conservation and Recovery Act ("RCRA")). Defendant Kamholz was additionally found guilty of Count 16 (obstruction of justice).

On October 22, 2013, the parties appeared before the Court to discuss issues relating to sentencing in this matter. At that time, the Court discussed the 128 impact statements submitted by members of the community, and noted that

> some of them relate to what seems to be a direct line to the activities that took place at the Tonawanda Coke plant, that is along the lines of proximate cause. On the other hand, some of the submissions are much more general. And as I understand the government's position in its papers -- and I don't think that has changed -- the government's position is that I have to look at options that flow from the identification of the victims in this case as the community as a whole.

Transcript of Proceedings on October 22, 2013, Dkt. #260, pp. 6-7. The Court then inquired as to whether the "government still maintains its position with respect to the victim in this case, if you will, being the community as a whole, rather than specifically identifiable individuals." *Id.* at p. 7. During the proceeding, the Court invited the government to submit additional briefing regarding the following two issues: (i) further authority to support the argument that the community as a whole can be considered the victim in this case, and (ii) a discussion of other cases to provide a context for the crimes committed by the defendants in the present case.

In preparing to respond to the Court's inquires, the government again evaluated the 128 impact statements submitted by community members and conducted further research regarding the definition of harm under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771. Based on this factual and legal review, the legislative history of the CVRA, and the government's ongoing commitment to advocate on behalf of all deserving victims harmed by the defendants' crimes, the government submits that in this case the harms inflicted by the defendants extend to individuals who were forced to breathe benzene-contaminated air illegally and deliberately released by the defendants.[1] These individual community members, in addition to being subjected to an increased risk of contracting benzene-related cancers and any and all of the physical harms associated therewith, described having sustained emotional distress and psychological harm as a result of having been subjected to such a prolonged and continuous exposure. Such harm, the government submits, should lie within Section 3771(e), which defines a crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense."

[1] Although the government previously filed a statement with respect to sentencing factors, Dkt. #236, adopting the findings of the presentence report ("PSR"), such statement is not inconsistent with the government's current view that individual community members can be deemed crime victims under the CVRA. In the PSR for Tonawanda Coke and Defendant Kamholz, the Probation Department states that

> Although the offense of conviction involves multiple violations of the Clean Air Act and the Resource Conservation and Recovery Act, the environmental impact and potential victim *injury or loss* is immeasurable and a causal link cannot be definitively identified. Therefore, the instant offense is not a property offense and did not involve victim *injury or loss*.

Tonawanda Coke PSR ¶ 53, Defendant Kamholz PSR ¶ 56 (emphasis added). Therefore, it appears that the Probation Department, similar to the government's initial position regarding victim status, focused on whether identifiable persons suffered a physical injury rather than acknowledging that victim status may attach as a result of psychological and emotional harm from being forced to breathe noxious gases illegally released by the defendants. Importantly, the government does agree with the PSR that at present, there is insufficient evidence to conclude that the offenses of conviction constitute property offenses. However, in light of the government's request to allow community members to testify at a sentencing hearing, such a finding will likely need to be revisited in the event community members can establish harm to their property or physical injury, which may include particulate matter originating from the Tonawanda Coke plant that settled onto their property and short term health effects from air pollution.

Therefore, the government now moves this Court to designate any members of the Tonawanda and Grand Island communities who were harmed by the defendants' illegal air pollution as crime victims under the CVRA, and additionally urges this Court to hold a sentencing hearing at which time community members can testify regarding the harm they suffered as a result of the defendants' conduct.

ARGUMENT

I. Tonawanda and Grand Island Community Members are Victims under the CVRA

A. Statutory Background

The CVRA, signed into law on October 30, 2004, "was designed to protect victims and guarantee them some involvement in the criminal justice process." *United States v. Moussaoui*, 483 F.3d 220, 234 (4th Cir. 2007). *See also Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1016 (9th Cir. 2006) ("The [CVRA] was enacted to make crime victims full participants in the criminal justice system."). The motivation for enactment of the CVRA was a Congressional finding that

> Crime victims already have a listing of rights in Title 42 of the United States Code. However, because those rights are not enumerated in the criminal code, most practitioners do not even know these rights exist. Further, the rights as they are currently enumerated do not contain any explicit enforcement provision. As such, crime victims often feel that they are ignored by a system that gives a great number of rights and protections to the person accused of the crime, but few to the victim. [The CVRA] addresses these problems by moving the victims' rights to Title 18 of the United States Code, where they will be more readily available to practitioners. It also amplifies the current rights and sets forth an explicit enforcement mechanism for those rights. [The CVRA] also provides funding for legal counsel for victims to assist them in the process and to ensure that these rights are enforced.

H.R. Rep. No. 108-711, 2004 U.S.C.C.A.N. 2274, 2277, 2004 WL 2348416, *4 (Sept. 30, 2004).

Pursuant to the CVRA, crime victims are afforded the following enumerated rights:

(1) The right to be reasonably protected from the accused.
(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
(5) The reasonable right to confer with the attorney for the government in the case.
(6) The right to full and timely restitution as provided in law.
(7) The right to proceedings free from unreasonable delay.
(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

18 U.S.C. § 3771(a). The CVRA provides that, if the Court determines that a person qualifies as a crime victim, the Court "shall ensure that the crime victim is afforded the rights described in subsection (a)." 18 U.S.C. § 3771(b)(1). The term "crime victim" is defined as a "person directly and proximately harmed as a result of the commission of a Federal offense…." 18 U.S.C. § 3771(e). The term "harm" is not further defined in the CVRA. However, as part of the Victims' Rights and Restitution Act ("VRRA") of 1990, the term "victim" is defined as a "person that has suffered direct *physical, emotional, or pecuniary harm* as a result of the commission of a crime…." 42 U.S.C. § 10607(e)(2). As mentioned above, the House Report for the CVRA specifically referenced the victim rights outlined in Title 42, and as such, it can be inferred that the three types of harm cognizable under the CVRA are physical, emotional, or pecuniary harm. *See United States v. Turner*, 367 F. Supp.

2d 319, 322 (E.D.N.Y. 2005) (noting that several of the rights enumerated under CVRA were previously included in VRRA).

The legislative history of the CVRA indicates that the term "victim" is to be construed broadly. *See* 150 Cong. Rec. S10910-01, S10912, 2004 WL 2271135 (Oct. 9, 2004) (Sen. Kyl) (the term "crime victim" as used in the CVRA "is an intentionally broad definition because all victims of crime deserve to have their rights protected."). The Second Circuit has stated that "[a]lthough the definition of victim is certainly broad, in determining whether one qualifies as a victim, a sentencing court can only consider the offense or offenses for which the defendant was convicted." *United States v. Battista*, 575 F.3d 226, 231 (2d Cir. 2009) (holding that the NBA was a victim of a former referee's conviction for conspiracy to transmit wagering information).

Under a related statute, the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, the Second Circuit discussed the causation standard for a finding of direct and proximate harm in *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2009). After noting that the MVRA is "inapplicable where determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process, [18 U.S.C.] § 3663A(c)(3)(B)," the court stated that in light of such limitation,

> we view the requirement that the harm have been "proximately" caused as a reflection of Congress's interest in maintaining efficiency in the sentencing process, as the term "proximate cause" is sometimes used "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of *what is administratively possible and convenient*." The requirement that the harm have been "directly" caused doubtless reflects the same interest in efficiency, because "the less

> direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation."

Id. at 135 (internal citations omitted) (emphasis in original) (expressing difficulty in the context of a financial fraud to determine whether innocent persons who had made stock purchases during the period of the conspiracy were victims). In *United States v. Marino*, 654 F.3d 310, 319 (2d Cir. 2011), the Second Circuit further discussed the meaning of direct and proximate harm under the MVRA and the Victim Witness Protection Act ("VWPA"), 18 U.S.C. § 3663(a)(2), and cited with approval the analysis from *United States v. Vaknin*, 112 F.3d 579, 589-90 (1st Cir. 1997). The *Vaknin* court explicitly adopted the following two-part causation standard to determine whether a person has been "directly and proximately harmed:"

> [W]e hold that a modified but for standard of causation is appropriate for restitution under the VWPA. This means, in effect, that the government must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal nexus between the conduct and the loss is not too attenuated (either factually or temporally). The watchword is reasonableness. A sentencing court should undertake an individualized inquiry; what constitutes sufficient causation can only be determined case by case, in a fact-specific probe.

Vaknin, 112 F.3d at 589-90 (1st Cir. 1997). *See also United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 460-71 (D.N.J. 2009) (providing a detailed discussion of the CVRA and its ties to the VWPA and the MVRA, and endorsing the test set forth in *Vaknin*).

> Similar to the two-part test described above, the Fifth Circuit has held that the
>
> CVRA's "directly and proximately harmed" language imposes dual requirements of cause in fact and foreseeability. A person is directly harmed by the commission of a federal offense where that offense is a but-for cause of the harm. A person is proximately harmed when the harm is a reasonably foreseeable consequence of the criminal conduct.

In re Fisher, 640 F.3d 645, 648 (5th Cir. 2011). The Fifth Circuit has further noted that an

> act is a but-for cause of [] an event if the act is a *sine qua non* of the event—if, in other words, the absence of the act would result in the non-occurrence of the event. Conversely, an act is not a but-for cause of an event if the event would have occurred even in the absence of the act. As Professor David Robertson has explained, ascertaining the existence of but-for causation requires a court to create "a mental picture of a situation identical to the actual facts of the case in all respects save one: the defendant's wrongful conduct is now 'corrected' to the minimal extent necessary to make it conform to the law's requirements." Then, the court asks "whether the injuries that the plaintiff suffered would probably still have occurred had the defendant behaved correctly in the sense indicated." Only if the answer to that question is "No" is the defendant's conduct a but-for-cause of the plaintiff's injuries.

In re Fisher, 649 F.3d 401, 403 (5th Cir. 2011) (internal citations omitted).

B. Victim Designation in the CITGO Case

On June 27, 2007, a jury returned a verdict of guilty against CITGO Petroleum Corporation and CITGO Refining and Chemicals Company, L.P., (collectively "CITGO") on Counts Four and Five of the superseding indictment, which charged CITGO with operating two tanks as oil-water separators without emission control equipment in violation of the Clean Air Act. *United States v. Citgo Petroleum Corp.*, 2011 WL 1337101, *1 (S.D. Tex., Apr. 5, 2011). CITGO's operation of the two tanks allowed benzene and other hazardous air pollutants to be emitted to the air for several years. The government moved the district court to designate certain individuals living near the CITGO refinery as victims, based on what seemed to be a history of exposure to the benzene fumes. *Id.* The district court allowed the testimony of a representative sample of alleged victims, regulatory witnesses, and expert witnesses during hearings to assist the court in determining whether alleged victims qualified as victims under the CVRA. *Id.* Following the testimony of these

witnesses and substantial briefing, the court found that the harm alleged was chemical exposure, but that the government's evidence had only shown common symptoms and complaints of odors emanating from the storage tanks. *Id.* at *3. The court held that notwithstanding the ill health effects suffered by individuals, "rumor, innuendo and suggestion," were not enough to show a nexus between the complained ill health symptoms and CITGO's illegal conduct. *Id.* at *4.

Following the denial of the government's motion for reconsideration, *United States v. Citgo Petroleum Corp.*, 2011 WL 3269688 (S.D. Tex., July 27, 2011), on July 6, 2012, 14 community members filed a motion with the district court seeking to be declared victims under the CVRA. *United States v. Citgo Petroleum Corp.*, Dkt. #776 (S.D. Tex., July 6, 2012) (hereinafter "CVRA Motion") (attached hereto as **Exhibit 1**). In the CVRA Motion, the community members argued that the district court erred in denying victim designation on the community members when it equated the term "harm" with the manifestation of medically diagnosed physical injuries. *See* Exhibit 1, p. 9. Instead, the community members argued that the harm they suffered was simply being forced to breathe contaminated air against their will and being placed at an increased risk of suffering future benzene-related physical injuries. *Id.* During the briefing on the issue, the community members submitted a reply to the arguments raised by CITGO, which expanded on their claims of harm. *United States v. Citgo Petroleum Corp.*, Dkt. #798 (S.D. Tex., Aug. 23, 2012) (attached hereto as **Exhibit 2**).

On August 22, 2012, the district court denied the community members' CVRA Motion, finding that the community members "have not presented any new evidence or offered any explanation as to why they could not have raised their two 'new' arguments four years ago…." *United States v. Citgo Petroleum Corp.*, Dkt.# 799 (S.D. Tex., Aug. 22, 2012). Thereafter, on September 4, 2012, the community victims filed a writ of mandamus with the United States Court of Appeals for the Fifth Circuit seeking an order directing the district court to afford them victim status under the CVRA. *In re Allen*, 12-40954 (5th Cir., Sept. 4, 2012) (attached hereto as **Exhibit 3**). On September 6, 2012, the Fifth Circuit held that the "CVRA does not contain a time limit within which putative crime victims must seek relief in the district court," and directed the district court to consider the arguments made by the community members in the CVRA Motion. *In re Allen*, 701 F.3d 734, 735 (5th Cir. 2012).

Eight days later, the district court applied the two-part but-for and foreseeability test from *In re Fisher* discussed above, and found that the community members had been directly and proximately harmed by CITGO's criminal conduct. *United States v. Citgo Petroleum Corp.*, 893 F. Supp. 2d 848 (S.D. Tex. 2012). Specifically, the court held that "had CITGO had proper emission controls on Tanks 116 and 117, the Community Members would not have suffered the aforementioned symptoms on November 7, 1996 and January 15, 1997. Thus, CITGO's 'commission of a Federal offense' directly and proximately harmed the Community Members on those specific days." *Id.* at 853. Importantly, because the court found that the community members were CVRA victims "based on the immediate negative health effects they suffered from breathing noxious fumes from Tanks 116 and 177," the

district court did not "consider their arguments that emotional distress, increased risk of future disease, and property-related harms would independently confer crime victim status on them under the CVRA." *Id.* at 853-54. The district court then addressed the CVRA rights of the community members, including a finding that the community members would be "entitled to deliver oral impact statements at sentencing." *Id.* at 854.

C. Tonawanda and Grand Island Community Members have been Harmed by the Defendants' Conduct

i. The Defendants' Conduct Involved the Release of Known Carcinogens and Particulate Matter into the Air

As established at trial and previously briefed by the government, the defendants' illegal operation of the byproducts bleeder valve allowed for significant quantities of coke oven emissions, a hazardous air pollutant, to be released to the air. This bleeder valve, which was in operation from the mid-1980s through 2009, was an unpermitted emission source, and as such, *any* emissions from this source were contrary to law. Coke oven emissions have been classified as a known human carcinogen, and the Environmental Protection Agency (EPA) has described coke oven emissions as follows:

> Coke oven emissions are among the most toxic of all air pollutants. Emissions from coke ovens include a mixture of polycyclic organic matter, benzene, and other chemicals that can cause cancer. Occupational exposure studies of coke oven workers have shown statistically significant excess mortality from cancers of the respiratory tract, kidney, and prostate and all cancer sites combined.

See Fact Sheet, available at http://www.epa.gov/airtoxics/coke/cokefact.pdf (last accessed September 30, 2013). Likewise, benzene is a highly toxic substance that is closely regulated by the EPA. The Supreme Court has recognized that

> Benzene is a toxic substance. Although it could conceivably cause harm to a person who swallowed or touched it, the principal risk of harm comes from inhalation of benzene vapors. When these vapors are inhaled, the benzene diffuses through the lungs and is quickly absorbed into the blood. Exposure to high concentrations produces an almost immediate effect on the central nervous system. Inhalation of concentrations of 20,000 ppm can be fatal within minutes; exposures in the range of 250 to 500 ppm can cause vertigo, nausea, and other symptoms of mild poisoning. 43 Fed.Reg. 5921 (1978). Persistent exposures at levels above 25-40 ppm may lead to blood deficiencies and diseases of the blood-forming organs, including aplastic anemia, which is generally fatal.

Industrial Union v. American Petrol. Inst., 448 U.S. 607, 616-17 (1980).

Likewise, the defendants' illegal operation of the Eastern Quench Tower (Tower #2) without baffles allowed for the unmitigated release of particulate matter into the surrounding community from at least 1997 to November of 2009. Exposure to particulate matter has been linked to a variety of health issues, including: "premature death in people with heart or lung disease, nonfatal heart attacks, irregular heartbeat, aggravated asthma, decreased lung function, and increased respiratory symptoms, such as irritation of the airways, coughing or difficulty breathing." *See* Particulate Matter (PM), available at http://www.epa.gov/pm/health.html (last accessed November 5, 2013).

As the Court is well aware, between July of 2007, and July of 2008, the New York State Department of Environmental Conservation ("NYS-DEC") conducted a Tonawanda Community Air Quality Study to evaluate air pollutant concentrations in the industrial area of Tonawanda, which utilized four air quality monitoring stations. The results of this study confirmed what many in the community had long suspected, that Tonawanda Coke was the source of the noxious odors and elevated levels of benzene in the atmosphere. In fact, for

the air monitoring station located directly north-east of Tonawanda Coke, in the direction of the prevailing winds the concentration of benzene was found to be 75 times higher than the annual guideline concentration established by the New York State Department of Health. The final report, released in October of 2009, identified Tonawanda Coke as the single largest benzene source contributing to the high benzene emissions at two of the stations. *See* Tonawanda Community Air Quality Study Final Report, October of 2009, p. 8-7, available at http://www.dec.ny.gov/docs/air_pdf/tonairfinalrpt.pdf (last accessed November 5, 2013).

Therefore, for a period of almost 20 years, the defendants criminally polluted the air with known carcinogens and particulate matter. As stated in an earlier submission, it is the government's view that the defendants' conduct essentially involved the indiscriminate and prolonged poisoning of an entire community.

ii. The Defendants' Conduct Resulted in Harm to Community Members

As a result of the defendants' conduct of illegally releasing known human carcinogens and particulate matter into the atmosphere over several decades, the defendants caused harm to Tonawanda and Grand Island community members who were forced, against their will, to breathe contaminated air. The harm that the community members have suffered comes in two varieties. First, the community members have had to endure the emotional trauma of living in a polluted environment and being subjected to uncontrolled noxious emissions. Second, the community members are at increased risk of contracting future illnesses relating to the defendants' pollution, which is certainly an unsettling and

deeply disturbing notion. Moreover, the government notes that many of the impact statements discuss physical injury and/or loss, such as acute effects of breathing polluted air (ear, nose, and throat irritations); black soot settling on homes, vehicles, and pools; loss of use and enjoyment of property; and devaluation of property values, and it is anticipated that testimony presented by community members at a sentencing hearing will link these physical injuries and loss to the criminal acts of the defendants which could the provide this Court with a third harm for purposes of the CVRA.

A review of the 128 impact statements from the community members is replete with examples of the harms discussed above. Many of the statements included descriptions of how Tonawanda Coke's criminal conduct reduced the quality of their everyday lives by being deprived of a clean environmental resulting in loss of the full use of their property, and thereby caused emotional trauma. Several focused on the horrendous smell that they had to live with day after day. Former Police Chief Ivancic stated "My house is constantly being covered in black soot and necessitates me power washing the house twice a year, along with the constant cleaning of our windows year round. *We are also subjected to noxious odors throughout the year.*" Dkt. #230, p. 32 (emphasis added). Joyce Hoffman Hogenkamp stated:

> Because of no baffles in the quench tower, it made it impossible to enjoy our back yard, with pool and hot tub. *There was always a horrible smell followed by a burn*. There was a black oily film on the pool and tar balls floating around. I had to wash white siding almost every day with Dawn soap to remove the oil clinging to it.

Dkt. # 230, p. 26 (emphasis added). Adele Henderson and Robert Hirsch noted:

> During the day the offensive smell was frequently so disgusting that it forced us indoors. I would be outside gardening, enjoying the birds or swimming in

> the pool and then without notice the *air would become unbearable* and I would have to rush indoors and close all the windows. …Before long we were checking the wind direction to see if it was "safe" to go to the river for our walk because if the wind was coming out of the SSW we learned we would be caught in its *reeking* path. *This made me incredibly angry and depressed*. I am an outdoors person – in the summer I spend the majority of my days outside.

Dkt. #230, p. 25 (emphasis added). Michael K., Teresa, Kyle, and Kelsey Higgins wrote that the defendants' conduct "[c]aused *extreme financial harm and emotionally worry* for me and my family. … I also own rental property in the town of Tonawanda that is very hard to rent because of the benzene pollution from this plan and the news stories covering it. Dkt. #230, p. 22 (emphasis added). Additional impact statements submitted by Eric Blendowski (Dkt. #231, p. 12), (Dkt. #230 p. 25), and Donald A. Vacanti (Dkt. #231, p. 62) and many others also describe how the criminal conduct of Tonawanda Coke has not only caused disruption from the normal use and enjoyment of their homes, but also the emotional stress of considering or actually moving to escape from the defendants' pollution to their financial detriment.

A number of the impact statements discuss property damage and/or devaluation that likely resulted from the defendants' actions. Branka Sciuk described how the emissions from Tonawanda Coke impacted his home by "constant film over windows and house," "no longer have picnic table or sitting chairs facing river," and "concrete in front patio is discolored." Dkt. #231, p. 25. John, Robin, Kaitlyn, John Jr. Bertini wrote: "Every year we have had to scrub down our siding because of the amount of black slimy soot that settles on our home, as do many of our neighbors." Dkt. #228, p. 11. Likewise, Ronald McEldowney stated:

> I live in a white vinyl sided house and because of no baffles in the quench towers and other violations, I've had to power wash my home excessively, I do not have a garage and the amount of tar and oil left on my car has led me to wash it daily or suffer from paint damage and a shortened life span of the vehicle.

Dkt. #230, p. 49.

Many of the individuals described serious health impacts they believed Tonawanda Coke's emissions either caused or contributed to ranging from respiratory diseases to many types of cancer, including leukemia, all of which highlight the devastating emotional impacts from the defendants' conduct. For example, the impact statements submitted by Heather L. Buck (Brown) and her father David E. Brown on behalf of the entire Brown family provide the court with a detailed example of how Tonawanda Coke's criminal activity physiologically impacted their family. Mr. Brown describes how the overall quality of life was impacted by the air emissions from Tonawanda Coke as follows:

> Our neighborhood was regularly blanketed with fumes as the gases cooled at night and our car was covered with grit all the time. The hot summers were the worst for the fumes because we had to sleep with the windows open. The most striking thing I noticed when we moved away from Kenmore was the fresh air and that I no longer had to wash the car all the time.

Dkt. #228, p. 20. His impact statement also includes a detailed description of the medical treatment his daughter Heather endured beginning in 1988 when she was diagnosed with Chronic Myelogenous Leukemia ("CML") at the age of 12 and the physical and emotional toll it had on all members of the Brown family. Heather's description of the impact of her diagnosis and treatment on her parents and sister are extremely illustrative of the emotional harm suffered by her family. Heather explains:

> My parents were told of the risks of the treatments including nausea, vomiting, mouth and throat soars, pain, dry mouth, skin redness, hair loss,

> fatigue, low blood counts, cataracts, growth issues, hormone problems, lung heart and kidney problems and sterility. I remember the doctor using the word "sterile" and seeing the reaction in my parents eyes. I didn't understand the meaning at the time but felt the sadness in the room. I suffered all of these side effects including ovarian failure (and hormone replacement therapy) for twelve years.
> …
> Once my white blood cells were wiped out, it was time for the new bone marrow. My older sister was a perfect match. I cannot imagine the feelings she must have been experiencing. Adolescence is difficult enough without knowing you are the one who can save your sister's life. Holes were drilled all around her pelvis and bone marrow extracted. She was released from the hospital with no pain medication. Little did she know that would endure pain and stress and all the emotional turmoil that comes with for years to come.

Dkt. #228, p. 22-23.

The concept that "harm" includes emotional trauma finds support in Second Circuit case law involving victims of child pornography that seek restitution against defendants convicted of possessing images of such victims. In *United States v. Lundquist*, --- F.3d ---, 2013 WL 4779644 (2d Cir. Sept. 9, 2013), the defendant was convicted of receiving and possessing child pornography images, some of which depicted a known victim referred to as "Amy." Amy sought restitution before the district court, which noted that the defendant's harm to Amy was that he possessed pornographic images of her, and that during the time of the defendant's possession, "Amy has sustained, and continues to sustain, significant psychological damage as a result of her knowledge that unidentified individuals have downloaded pornographic images of her from the Internet." *Id.* at *4. The district court found that the defendant proximately caused 1/113 of Amy's emotional harm because a total of 113 defendants had been convicted of possessing images of Amy, calculated the defendant's personal share of the total harm, yet found the defendant jointly and severally

liable for the full amount of Amy's emotional ham. *Id.* On appeal, the Second Circuit upheld the district court's finding that the defendant was the proximate cause of a portion of Amy's emotional trauma, but remanded the case after finding that imposition of joint and several liability was in error. *Id.* at *11-16.

In the environmental crimes context, there is a body of cases involving asbestos prosecutions that supports the notion that an increased risk of contracting environmental cancers, without any present physical injury, constitutes harm under the CVRA. In *United States v. Weintraub*, 273 F.3d 139 (2d. Cir. 2001), a real estate developer and two corporations he controlled were convicted following a jury trial of violations of the Clean Air Act relating to an asbestos abatement project. Importantly, at sentencing, each corporation was sentenced to pay restitution in the amount of $16,600 to "to cover medical monitoring for workers exposed to asbestos." *Id.* at 143. In *United States v. Yi*, 704 F.3d 800 (9th Cir. 2013), the court upheld the defendant's conviction for conspiracy to violate the Clean Air Act. Although not a subject of his appeal, as part of the defendant's sentence before the district court, he was ordered to pay restitution in the amount of $5,400 to fund medical monitoring for three workers that were exposed to asbestos fibers. *See United States v. Yi*, 10-CR-793 (C.D. Cal.), Dkt. #159 (Judgment and Commitment Order, June 7, 2011), Dkt. #127 (Government's Sentencing Position, May 16, 2011, p. 16) (stating that "the harm suffered by these individuals is the exposure to asbestos. That exposure creates a risk of developing serious medical conditions."). *See also United States v. Scardecchio et al.*, 05-CR-472 (E.D. Pa.) (defendants' sentences included the payment of restitution to employees of the company that were exposed to asbestos); and *United States v. Mauck et al.*, 02-CR-57

(N.D. W.V.) (same). Consequently, if exposure to asbestos constitutes a harm simply because it increases a person's risk of future asbestos-related illness, then it necessarily follows that exposure to hazardous air pollutants and particulate matter, which increases a person's risk of contracting cancers and respiratory ailments, is equally a harm.

Like Amy in the *Lundquist* case, and the residents around Citgo in Corpus Christi, Texas, individual community members in the present case have been subjected to emotional harm due to the defendants' criminal acts of releasing hazardous air pollutants and particulate matter into the air over a lengthy period of time. The emotional harm they have suffered by the forced inhalation of polluted air, as well as the increased risk of future deleterious health effects, constitutes harm and is a sufficient basis to confer CVRA designation. Nothing in the text or legislative history of the CVRA precludes such a finding. Therefore, the government moves this Court to allow community members to present evidence of the harm they have suffered during a sentencing hearing.

D. The Need for a Sentencing Hearing

This Court has broad discretion in determining the "procedure [to be] followed in resolving disputed factors at sentencing." *United States v. Prescott*, 920 F.2d 139, 144 (2d Cir. 1990). Certainly, "it is well established that a district court need not hold an evidentiary hearing to resolve sentencing disputes, as long as the defendant is afforded some opportunity to rebut the Government's allegations." *United States v. Broxmeyer*, 699 F.3d 265, 280 (2d Cir. 2012) (internal quotation marks omitted). However, in a case such as this, where there are open questions as to which individual community members will qualify as

crime victims under the CVRA, the better practice is to hold a sentencing hearing where such individuals can testify under oath as to the harm they suffered as a result of the defendants' conduct. This was the procedure utilized by the district court in *CITGO* to initially determine which community members would qualify as victims under the CVRA. Moreover, it is anticipated that the defendants will object to the designation of any victims as a result of their conduct, and therefore, serious factual questions will remain as to which individual community members suffered sufficient harm for CVRA purposes. In at least two other non-environmental crimes cases, a sentencing hearing was utilized to either assist in the identification of victim status or allow the victims to testify regarding the impact of the defendant's crimes. *See United States v. Twigg*, 424 Fed.Appx. 881, 884 (11th Cir. 2011) ("At Twigg's sentencing hearing, [the Postal Inspector] testified about the specific method he used to determine the number of victims."), and *United States v. Collins*, 640 F.3d 265, 267 (7th Cir. 2011) (five victims of the defendant's identity theft crimes testified at a sentencing hearing regarding the impact of the identity theft on their lives). As such, the government respectfully moves this Court to allow the testimony of Tonawanda and Grand Island community members at a sentencing hearing to allow for a full and complete determination as to who is a CVRA victim of the defendants' criminal conduct.

II. Analogous Case Law as a Context for the Crimes in the Present Case

In reference to the factors to be considered in imposing a sentence as set forth in 18 U.S.C. § 3553(a), the Court has requested that the government provide additional information regarding the "seriousness of the offense." To determine the context in which the present case should be considered, the government proposed to the Court on October

22, 2013, that the Court should consider the sentences imposed in analogous cases. As previously briefed by the government and addressed above, the present case involves the defendants' release of hazardous air pollutants, including benzene, and particulate matter into the atmosphere over the course of at least two decades. The defendants have maintained that the amount of benzene is unquantifiable.[2] In focusing on other non-asbestos air pollution cases that involved the release of unknown amounts of dangerous gases, the government has identified three prior cases. Two of the cases were resolved by plea agreements, one by trial.

The cases resolved by plea agreements include *United States v. Pelican Refining Company, Inc.,* 11-CR-227 (W.D.La. 2011) and *United States v. Columbus Steel Casings,* 11-CR-180 (S.D. Ohio 2011). In *Pelican Refining,* the defendant was a refinery which admitted it illegally utilized an unpermitted petroleum storage tank that caused the release of air pollutants over a two year period. In addition, the company admitted to obstruction of justice by falsifying records to prevent inspectors from detecting the use of the storage tank. The defendant sentenced to a fine of $10 million, and required to pay $2 million in community service for several projects including

> for research and analysis of the environmental fate, environmental impact, human health impact, mitigation of negative human health effects, and remediation of environmental damage (including habitat restoration) due to benzene, toluene, ethylbenzene, and xylene releases and emissions in Southwest Louisiana, with a primary focus on such releases and emissions

[2] Although the government agrees that the amount of benzene released by the defendants through their illegal operation of the byproducts bleeder valve cannot be quantified, quantification of a different hazardous air pollutant, coke oven emissions, can be made. During the trial, Harish Patel testified that based on the defendants' responses to information request letters, his knowledge of the operation of the bleeder valve, and his review of the bleeder valve circular charts, that in a given year, the bleeder valve would emit approximately 173 tons of coke oven gas into the atmosphere.

> originating from oil refineries and other crude oil processing, production, transport, and storage facilities.

United States v. Pelican Refining Company, Inc., 11-CR-227 (W.D.La. 2011), Dkt. #5, p. 7 (Plea Agreement).

In *Columbus Steel Casings,* the defendant pleaded guilty to six Clean Air Act violations, including the knowing operation of emission units without air pollution control equipment in operation. As part of that plea agreement, the defendant was fined $660,000 and paid $165,000 as community service for a medical monitoring program for residents of the south side of the city of Columbus who could have been exposed to illegal air pollutants from its steel foundry. It is respectfully submitted that although both *Pelican Refining* and *Columbus Steel*, involved the release of unquantifiable amounts of pollution, those cases were resolved by way of plea agreements and did not involve the extensive time period of violations that occurred in the present case. Accordingly, the sentence in the present case should be well in excess of those two cases.

The one Clean Air Act case that involved a conviction after trial was *United States v. Atlantic States Cast Iron Pipe Co.*, 627 F.Supp.2d 180 (D.N.J. 2009). *See also United States v. Maury*, 695 F.3d 227 (3rd Cir. 2012). In that case, the defendant company was fined $8 million and placed upon a four year probation period during which it was subject to oversight by a court–appointed monitor. In addition, four employees of the company were convicted and received terms of imprisonment ranging from 70 months to 6 months depending upon their roles in the offenses. The government did not seek community service in that case.

To provide a larger sample of cases as a context to the present case, the government sought additional comparisons. The dangers and the risk of harm regarding exposure to unquantifiable amounts of a known carcinogen are comparable to the Clean Air Act offenses involving the illegal releases of asbestos. Both examples involve the release of known carcinogens in unknown quantities. However, the difference between asbestos cases and the present case is the typical asbestos case is usually focused upon one incident, one area affected, and a finite number of exposed individuals such as abatement worker. Accordingly, the government respectfully submits that the present case is even more serious than the typical asbestos cases and warrants a more severe sentence.

Nevertheless, in examining cases where the asbestos offense involved multiple releases over a period of time, significant sentences have been imposed. For example, in *United States v. Thorn,* 659 F.3d 227 (2d Cir. 2011), the defendant was convicted for illegal asbestos removals extending over a ten year period. Following several appeals, the defendant was ultimately sentenced to a 60 month term of imprisonment for the Clean Air Act offenses and a concurrent 144 month term of imprisonment for a money laundering conspiracy. In *United States v. Salvagno*, 344 Fed.Appx. 660 (2d Cir. Aug. 28, 2009), two brothers, Alexander and Raul Salvagno, engaged in illegal asbestos activities for over a 10 year time period. The defendants were sentenced to 25 and 19.8 years imprisonment, and required to pay over $23 million and $22 million dollars respectively in community service. Finally, in *United States v. Gordon-Smith*, 08-CR-6019 (W.D.N.Y.), the defendant was

convicted as a result of an asbestos abatement project that lasted from May 2007 until February 2009 and sentenced to a term of imprisonment of 72 months.

Distinguishing the present case from any other environmental crimes case is the inclusion of multiple Clean Air Act convictions along with multiple Resource Conservation and Recovery Act convictions, all of which extended over lengthy periods of time and involved some of most toxic and hazardous materials. The government has previously provided the Court with case summaries for convictions involving these two statutes, *see* Dkt. #245-3 and #245-4. It is respectfully submitted that based on the aggravating factors present here, *see* PSR for Tonawanda Coke ¶120, and the combination of extremely serious Clean Air Act and Resource Conservation and Recovery Act offenses, the substantial penalty sought by the government should be imposed.

CONCLUSION

For the foregoing reasons, the government respectfully urges this Court find that Tonawanda and Grand Island community members are crime victims pursuant to the CVRA, and should order a sentencing hearing during which members of the community can testify under oath regarding the harm they suffered as a result of the defendants' conduct. Moreover, the government respectfully moves this Court to consider the cases cited herein which lead to the conclusion that the defendants' criminal conduct was extremely serious.

DATED: Buffalo, New York, November 5, 2013.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v- 10-CR-219-S

TONAWANDA COKE CORPORATION and
MARK L. KAMHOLZ

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2013, I electronically filed the foregoing GOVERNMENT'S SUPPLEMENTAL SENTENCING MEMORANDUM AND MOTION FOR DESIGNATION OF VICTIM STATUS UNDER THE CRIME VICTIMS' RIGHTS ACT with the Clerk of the District Court using its CM-ECF system, which would then electronically notify the following CM/ECF participants on this case:

Rodney O. Personius, Esq.

Gregory F. Linsin, Esq.

Jeanne M. Grasso, Esq.

Ariel S. Glasner, Esq.

John J. Molloy, Esq.

I further certify that I provided a copy of the foregoing via inter office mail to the following participant on this case:

United States Probation Department
Attn: Susan C. Murray, USPO

S/ AARON J. MANGO

AARON J. MANGO